

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELVIN RENARD WARREN,

Defendant-Appellant.

UNPUBLISHED

April 11, 2006

No. 258487

Wayne Circuit Court

LC No. 03-008632

Before: Hoekstra, P.J., and Wilder and Zahra, JJ.

MEMORANDUM.

Defendant appeals by delayed leave granted his sentence of four to 15 years in prison imposed on his plea-based conviction of manslaughter with a motor vehicle, MCL 750.321. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The sentencing guidelines recommended a minimum term range of 29 to 57 months. Defense counsel objected to the scoring of Offense Variable (OV) 5, MCL 777.35, psychological injury to a member of the victim's family, at 15 points. The trial court implicitly rejected the challenge.

In calculating the sentencing guidelines the trial court has discretion to determine the number of points to be scored, provided that evidence in the record supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We will uphold a scoring decision for which there is any evidence in the record. *Id.*

OV 5 authorizes the scoring of 15 points if "[s]erious psychological injury requiring professional treatment occurred to a victim's family." MCL 777.35(1)(a). MCL 777.35(2) indicates that 15 points should be scored "if the serious psychological injury to the victim's family may require professional treatment," and that "[i]n making this determination, the fact that treatment has not been sought is not conclusive."

Defendant argues that he is entitled to be resentenced because no evidence supported the scoring of OV 5 at 15 points. He also asserts that he is entitled to resentencing because the trial court scored OV 5 based on facts not found beyond a reasonable doubt by the trier of fact as required by *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

We affirm. No evidence showed that any member of the victim's family had sought professional psychological treatment in connection with her loss; however, the victim's son indicated that he and other members of his family were having an extremely difficult time dealing with the victim's loss, and that he anticipated that the difficulties would continue for some time. We conclude that some evidence supported the scoring of OV 5 at 15 points. MCL 777.35(2). No abuse of discretion occurred. *Hornsby, supra*.

Blakely, supra, does not apply to Michigan's indeterminate sentencing because under that system, the maximum term is not set by the sentencing court, but rather is determined by statute. See *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). We are bound by *Claypool, supra*. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra